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No. 06-1595

IN THE SUPREME COURT OF THE UNITED STATES

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE TENNESSEE EDUCATION ASSOCIATION AND THE METROPOLITAN NASHVILLE EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Tennessee Education Association ("TEA") and the Metropolitan Nashville Education Association ("MNEA") submit this brief as *Amici Curiae* in support of the Petitioner Vicky S. Crawford.[1] The TEA is a voluntary membership association and is Tennessee's largest professional organization. The TEA is the Tennessee state affiliate of the National Education Association ("NEA"). The TEA's members include elementary and secondary teachers, school administrators, educational and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. Over sixty percent of the 72,000 teachers currently licensed to teach in the public schools of Tennessee are members of the TEA. In addition, there are more than 2,200 non-licensed educational support members in the TEA. Among the pertinent purposes and goals of the TEA are the defense of the civil and professional rights of educators and the securing and enforcement of fair and equitable employment procedures for educators.

The MNEA is a local affiliate of the TEA. The MNEA's members include licensed educators employed in the public schools throughout the Metropolitan Nashville Public Schools. Specifically, MNEA's members include elementary and secondary teachers, school administrators, educational and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. More than 3,000 licensed teachers in the

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amici* states that none of the parties or its counsel wrote the brief in whole or in part and that no one other than *Amici* and their counsel made any monetary contribution to the preparation or submission of the brief.

Metropolitan Nashville Public Schools are members of the MNEA. In addition, as the recognized professional employees' organization for professional employees in the school system, the MNEA represents the interests of all 5,600 licensed educators in the Metropolitan Nashville Public Schools, including non-members, for purposes of collective bargaining negotiations under state law.[2] The MNEA therefore negotiates employment rights and compensation for all school system educators, represents educators in employment related matters, and insures that educators' rights are protected in personnel matters. The MNEA's mission is to promote excellence in the school system, seek community support for public education, secure economic and professional security for educators, maintain a strong united teaching organization, advance human and civil rights in education, and empower teachers.

Based on the functions and missions of the TEA and the MNEA, they are interested in this precedent setting litigation which affects the rights of the professional employees that they represent. This case implicates the employment interests of teachers and others who may be called upon to testify or provide information in internal investigations of discrimination and harassment. Protecting teachers and others who participate in such internal investigations conducted by management is germane and central to the associational purposes of the TEA and the MNEA.

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[2] Tennessee is a "right to work" State, so that membership in the MNEA is not required, and the MNEA has no authority to require payment of an agency fee by non-members. The MNEA nonetheless is the recognized representative of all professional employees in the Metropolitan Nashville Public Schools pursuant to the Education Professional Negotiations Act, *Tenn. Code Ann. §§ 49-5-601 et seq.*

SUMMARY OF ARGUMENT

When an employee discloses information to her employer about sexual harassment by a supervisor, she is opposing a practice made unlawful by Title VII of the Civil Rights Act of 1964. She is protected from retaliation by her employer for opposing that unlawful practice. 42 U.S.C. § 2000e-3(a) makes it an unlawful employment practice to retaliate against an employee "because [s]he has opposed any practice, made an unlawful employment practice by this subchapter." The plain language of the "opposition clause" in the anti-retaliation provision of Title VII does not depend on any particular quantity of opposition, nor does it require that the opposition occur in any particular setting.

The decision of the Sixth Circuit, on the other hand, denies protection from retaliation to an employee whose opposition to unlawful practices occurs in the context of an employer investigation into those practices. The Sixth Circuit's holding that an employee's cooperation with an employer's internal investigation was not opposition under the meaning of Title VII's opposition clause will have detrimental effects on the rights and interests of educators, and others, called on to answer questions or provide information in sexual harassment investigations and other internal investigations into allegations of discriminatory conduct.

Only by reading into the "opposition clause" a condition on the type of opposition that Congress did not place there has the Sixth Circuit reached this result. This decision by the Sixth Circuit will discourage employees from answering questions truthfully in employer investigations of sexual harassment and other discriminatory conduct. This

decision will undermine internal investigations and informal resolution of workplace discrimination issues. In the hands of an unscrupulous employer, this decision will convert the affirmative defense in *Faragher* from shield to sword. *Faragher v. City of Boca Raton, 524 U.S. 775 (1998).* Just as occurred here, an employer investigating one employee's allegation of supervisor harassment will be encouraged by the Sixth Circuit's decision to use its investigation to root out other potential claimants and discharge them before they repeat their claims in some other forum.

The Sixth Circuit's decision therefore is not only at odds with the plain language of the "opposition clause" but in fact turns that clause on its head. The Sixth Circuit's decision creates a safe-haven of retaliatory conduct that is unprotected by the broad language of the opposition clause.

ARGUMENT

A. The Sixth Circuit wrongly concluded that opposition to an unlawful employment practice is protected only if that opposition is actively initiated by the employee and not if it takes the form of testimony or disclosures in response to employer inquiries.

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII or who participate in Title VII proceedings:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed

> any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

The pertinent words, "*because he has opposed* any practice, made an unlawful employment practice by this subchapter," are deliberately broad. The EEOC in its Compliance Manual declares that complaining to anyone about alleged discrimination against oneself or others is an example of covered opposition conduct. *EEOC Compliance Manual, Section 8-II(B)(2).* An individual's internal complaint to a supervisor has been held to "surely" constitute protected opposition. *Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 65 (2nd Cir. 1992); see also, Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Lambert v. Genesee Hospital, 10 F.3d 46, 55 (2nd Cir. 1993), cert. denied, 511 U.S. 1052 (1994).*

This broad protection for opposition is balanced by the requirement that the opposition be reasonable. *Clark County School District v. Breeden, 532 U.S. 268, 271 (2001).* The activity by which opposition is expressed must also be reasonable. Consequently, bad faith accusations, opposition conduct that so interferes with the performance of the job as to render the employee ineffective, and opposition that unreasonably disrupts the work place, are not protected.[3] The participation clause's protections thus have generally been regarded as more expansive and broader than those of the opposition clause. *See, e.g., Slagle v. County of Clarion,*

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[3] The EEOC declares that the manner of opposition must be "reasonable" to balance the right of opposition and the public's interest with the employer's need for a stable and productive workplace. *EEOC Compliance Manual, Section 8-II(B)(3)(a).*

435 F.3d 262, 266 (3rd Cir. 2006); Deravin v. Kerik, 335 F.3d 195, 2003 (2nd Cir. 2003); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989).

But in this case, the Sixth Circuit did not base its decision on any conclusion about the reasonableness of Crawford's beliefs or the reasonableness of her manner of opposition. Instead, the Sixth Circuit apparently concluded that while a complaint made to a supervisor that is employee-initiated is protected opposition activity, a complaint made to a supervisor in response to the supervisor's inquiry is not.

According to the Sixth Circuit's opinion, Crawford worked for the Metropolitan school system for thirty years until she was fired.[4] Crawford was called in to meet with school system officials in connection with an investigation of sexually inappropriate behavior by Dr. Gene Hughes. Hughes was the school system's employee relations director. In response to questioning in the course of the investigation of Hughes' behavior, Crawford told the investigators that Hughes had sexually harassed her and other employees. She provided a detailed and vivid description of several examples of Hughes' harassment. Crawford was one of three employees who accused Hughes of sexually inappropriate conduct during the course of this investigation. After the investigation, Hughes was not disciplined, but all three of the employees who accused him of improprieties were immediately investigated themselves on other grounds, and all were promptly discharged.

The Sixth Circuit considered claims by Crawford that she was terminated in violation of both the "opposition" and

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[4] The Sixth Circuit, considering an appeal from a grant of summary judgment, viewed the facts in the light most favorable to Crawford.

"participation" clauses of Section 704(a). The Sixth Circuit rejected Crawford's opposition clause claim as follows:

> "First, Crawford's actions do not constitute opposition under the meaning of the opposition clause. We have enumerated the types of activities that constitute opposition under Title VII: 'complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer – e.g., former employers, union, and co-workers.' *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). The general idea is that Title VII 'demands active, consistent "opposing" activities to warrant ... protection against retaliation.' *Bell v. Safety Grooving and Grinding, LP*, 107 F. App'x. 607, 610 (6th Cir. 2004).
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> "Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing. This is not the kind of overt opposition that we have held is required for protection under Title VII."

By pointing out that Crawford does not claim to have made complaints prior to the investigation and took no further action following the investigation,[5] the Sixth Circuit's decision seems to be based to some extent on the quantity of opposition conduct by Crawford. However, even the Respondent Metro acknowledged in its Response to Crawford's Petition for Rehearing in the Sixth Circuit that the quantity of opposition conduct is not a basis for denying an employee the protection of Title VII's opposition clause. (Metro Response to Petition for Rehearing, p. 4). Nothing in the text of the opposition clause, the EEOC's Compliance Manual, or the decisions interpreting the clause suggests that some particular quantity of opposition activity is necessary for the protection to apply.

The only remaining explanation for the Sixth Circuit's decision is the notion that Crawford's opposition in an internal investigation is not protected because it was not "active" or "consistent." The Sixth Circuit emphasized that Crawford did not "instigate or initiate" a complaint prior to cooperating in the internal investigation. Apparently, the Sixth Circuit concluded that while Crawford's claims of harassment would be protected opposition activity if she volunteered or otherwise initiated the disclosure of those claims, they were not protected here because they were disclosed in response to questions by her employer.[6]

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[5] Crawford made her complaints in the investigation to the individuals charged with the responsibility of investigating and addressing those complaints on behalf of her employer. The Panel decision does not suggest what other sort of action Crawford should have taken following the investigation.

[6] In addition to applying an "active initiation" requirement that is not found in the text of the opposition clause, the Sixth Circuit also ignored a critical fact that should limit the application of an "active initiation" requirement should this Court adopt that requirement -- the individual

Certainly Ms. Crawford's detailed account of the sexual harassment she experienced at the hands of Hughes, shared in an investigative proceeding, satisfied the reasonableness requirement discussed by this Court in *Breeden*. It was reasonable for Ms. Crawford to participate in the internal investigation launched by her employer. It was reasonable for Ms. Crawford to respond to questions posed by her employer in an honest and truthful manner. It was also reasonable that Ms. Crawford thought she was protected by Title VII's anti-retaliation provisions when she spoke as a witness in an internal sexual harassment investigation launched by her employer.

Ms. Crawford had an obligation, as an employee, to answer her employer's questions in an honest and truthful manner. There is simply no reason why the opposition clause should provide less protection to her than it would to someone who made the same complaints not because there was an investigation but because of some contractual duty or other sense of obligation or motivation. In either case the level of "active initiation" is no different. And in either case, there is no statutory basis for the imposition of an "active initiation" requirement superimposed on the opposition clause.[7]

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who was engaging in the harassing conduct, Mr. Hughes, was the employee relations director, the person to whom an actively initiated complaint of harassment ordinarily would be directed.

[7] Because the Sixth Circuit's "active initiation" requirement finds no support in the language of the opposition clause or in the EEOC guidance, it is difficult to discern how that requirement might be interpreted in other contexts. For example, complaints to co-employees have in some instances been held to constitute opposition activity. Is it a defense that the co-employee initiated the discussion? Where the activity involves signing a letter or petition, is it a defense that the employee's signature was requested by someone else? The Sixth Circuit's "active initiation" requirement could spawn a factual dispute in virtually any

Under the Sixth Circuit's decision, if two employees offered precisely the same sort of information in the internal investigation, but one was summoned to provide information while the other volunteered to provide it, they would be treated entirely differently under the opposition clause. The one who volunteered to provide information might be protected because of her "active initiation" of opposition, while the one who was summoned would be unprotected. This irrational distinction finds no basis in the text of the opposition clause.

B. The Sixth Circuit's decision undermines the purpose of Title VII's anti-retaliation provisions.

The purpose behind Section 704(a) is to prevent employers from taking actions that will deter employees from complaining to their employer:

> "The anti-retaliation provision seeks to prevent employer interference with unfettered access to Title VII's remedial measures. It does so by prohibiting employer actions that are likely to 'deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405, 2415 (2006).*

The Sixth Circuit's decision to allow Ms. Crawford to be terminated for her cooperation in an internal investigation regarding the sexual harassment of Hughes is

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opposition clause case over whether the opposition activity was initiated by the plaintiff or flowed as a consequence of activity initiated by someone else, with the latter presumably beyond the protection of Title VII.

directly contrary to this purpose. This Court has acknowledged that Section 704(a) should be interpreted to provide broad protection:

> "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and *act as witnesses.* 'Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.' Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *Id. at 2414 (internal citation omitted) (emphasis added).*

The Sixth Circuit's requirement that an employee actively initiate a complaint, rather than making a complaint in response to an inquiry or investigation, does not interpret the anti-retaliation provision to provide broad protection. Rather, it narrows the protection afforded under Title VII and discourages "cooperation of employees who are willing...to act as witnesses...."

C. The Sixth Circuit's decision establishes a dangerous precedent that threatens employees who cooperate in internal investigations of discrimination and undermines employer efforts to informally resolve discrimination claims.

The Sixth Circuit's decision is particularly pernicious in the context in which this very case arises, supervisor sexual harassment. Where there is no tangible employment action taken, an employer defending a claim of sexual harassment by a supervisor may raise an affirmative defense

to liability or damages by proving (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998).* The availability of this affirmative defense encourages employers to create internal mechanisms for receiving, investigating, and resolving complaints of sexual harassment. Those internal mechanisms, in turn, encourage early and informal resolutions of harassment claims. Such early and informal resolutions reduce the burden on the EEOC and further the purposes of Title VII.

The Sixth Circuit's decision will turn these salutary benefits on their heads. The affirmative defense of *Faragher* and *Ellerth* was meant to be a shield for employers who act reasonably and promptly to eliminate discriminatory conduct by supervisors. It was not meant to be a sword with which employers could safely rid themselves of victims of discrimination without liability. Yet, such an iniquitous result is the product of the Sixth Circuit's decision. The employer who fires a witness will insist that it is protected under *Faragher* and *Ellerth* because that witness was fired before she actually initiated her own complaint under the employer's internal procedure. Meanwhile, the employer will be protected under the Sixth Circuit's decision here from a claim of retaliation. Only the individual whose complaint is being investigated will enjoy the protection of the opposition clause.

Of course, not all employers will misuse the internal investigations described in *Faragher* and *Ellerth* in this way. But the occurrences here, the discharges of three

complaining witnesses while no action was taken against the offending supervisor, reveal the reality that this sort of misuse of the internal investigation process will occur, and the Sixth Circuit has sanctioned it. Meanwhile, for other well-motivated employers, the real value of internal investigations in uncovering and correcting discriminatory behavior by supervisors will be diminished. A witness who is not the complaining party will be discouraged from revealing other instances of harassment in an investigation, for fear that the revelation could lead to a retaliatory discharge without any protection under the opposition clause. The internal mechanism for investigating harassment complaints will be less valuable and less useful because of other employees' unwillingness to be candid. As a consequence, there will be fewer informal resolutions of harassment claims. An employer will find it far more difficult to interview potential witnesses when investigating discriminatory practices. Sensitive information will be much less forthcoming if employees fear that cooperating in an internal investigation by an unscrupulous employer could jeopardize their livelihood, without recourse. An important key to effective enforcement of Title VII will be diminished or, in some cases, lost. *Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. at 2414.*

The EEOC has informed employers that anti-harassment policies are ineffective without assurances to employees that participation will not result in retaliation:

> "An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment *or provide information related to such complaints.* An anti-harassment policy and complaint procedure will not be effective without such an assurance." *EEOC Enforcement Guidance:*

Vicarious Employer Liability for Unlawful Harassment By Supervisors (http//www.eeoc.gov/policy/docs/harassment.html).

The prospect of permissible employer retaliation against witnesses in an internal investigation thus begs another question. The Sixth Circuit's decision, if left undisturbed, will produce precisely the result that the EEOC warns against in this guidance – it will leave the employer's assurances unreliable and will consequently render the employer's anti-harassment policy and complaint procedure ineffective. If the employer's anti-harassment policy and complaint procedure is therefore ineffective, will it satisfy the requirements of *Faragher* and *Ellerth*. Perhaps not, but even that failing will subject the employer only to liability on the claim under investigation. As to witnesses like Crawford who offer corroborating evidence in the investigation, the Sixth Circuit's decision creates a safe haven for employers to engage in retaliation.

The Sixth Circuit's decision does not further the Congressional policy in the opposition clause, is inconsistent with the plain meaning of the opposition clause, and undermines internal investigations of harassment claims and the benefits to both employees and employers that flow from those investigations. It is contrary to the opposition clause as it is written and as it has been interpreted by the EEOC and by this Court.

CONCLUSION

The TEA and the MNEA as *Amici Curiae* respectfully submit that the Sixth Circuit's decision should be reversed.

Respectfully submitted,

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